UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/787
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 787

Case No. 868: ABRAMOV

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Hubert Thierry, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 11 June and 1 November 1994 and 28 February 1995, Evgueni Abramov, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the President of the Tribunal, with the agreement of the Respondent, extended to 30 June 1995, the time-limit for the filing of an application;

Whereas, on 15 June 1995, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia, to order:

> "[That I] be reinstated as a staff member of the United Nations and respectfully request the Tribunal to rescind the decision of the Chief of Russian Translation Section (...) accepted by the Personnel Office and transmitted to me in a memorandum dated 29 December 1992 not to renew my contract or offer a new one and to direct [United Nations] Geneva Office to reinstate me as a United Nations staff member.
>
> ...
>
> 6. ... payment of salary lost during the period of unemployment between the expiry of my contract and the reconstitution of my career;

7. ... my reappointment as staff member retroactively [to] 8 February 1993;

8. In the event of compensation being paid in lieu of reappoint[ment], I request the granting of award in the amount of two years' net base salary."

Whereas the Respondent filed his answer on 2 January 1996;

Whereas the Applicant filed written observations on 26 March 1996;

Whereas, on 1 October 1996, the Applicant filed an additional document with the Tribunal;

Whereas the facts in this case are as follows:

The Applicant entered the service of the Organization on 8 January 1989, on a one-year fixed-term appointment as an Associate Translator in the Conference Services Division, Russian Translation Section, at the United Nations Office in Geneva (UNOG), at the P-2, step I level. His Letter of Appointment stated that he was "on secondment from the Government of the Union of Soviet Socialist Republics". His Personnel Action Form dated 30 July 1991 states that "as from 1.8.91 staff member is holding a fixed-term appointment without a secondment basis".

The Applicant was promoted to the P-3 level on 1 August 1991 and his functional title was changed to Translator. By memorandum dated 4 December 1991, the Chief of the Russian Translation Section informed the Chief of the Languages Service that he recommended that the Applicant's fixed-term appointment be extended for one year. He also stated that the Applicant's performance "has shown some improvement of late in certain technical fields" but that "his progress has been slower than desired".

In a memorandum dated 27 November 1992, to the Chief of the Languages Service, the Chief of the Russian Translation Section did not recommend the renewal of the Applicant's fixed-term contract that was to expire on 7 January 1993. He stated that the

Applicant's performance "continues to be totally inadequate, having in fact deteriorated in the recent past". The Chief of the Languages Service informed the Chief of the Personnel Service of this recommendation on 10 December 1992. As the UNOG Personnel Service did not receive this recommendation until 14 December 1992, the UNOG Administration granted the Applicant a one-month extension, through 7 February 1993, in order to allow him to prepare for his departure.

During his service, the Applicant received four performance evaluation reports (PERs). His first PER, which covered the period from 8 January 1989 to 18 August 1989, evaluated his overall performance as "good".

The staff member who became Chief of the Russian Translation Section was the First Reporting Officer (FRO) in the next three PERs. In the Applicant's second PER, which covered the period from 19 August 1989 to 31 December 1990, the FRO rated the Applicant as "good" and the Second Reporting Officer (SRO) rated the Applicant as "very good". In the second PER, the FRO observed: "while only fair at the beginning of the reporting period, his quality of work has lately become noticeably better". In the Applicant's third PER, which covered the period from 1 January 1991 to 29 February 1992, the SRO evaluated the Applicant's quality of work as "good". However, the FRO noted as a "Special Comment" that the Applicant's performance "still leaves much to be desired" and that he had to "do a lot to improve his work if he is to become a full-fledged UN translator". In the Applicant's fourth PER, covering the period from 1 March 1992 to 31 December 1992, the SRO rated the Applicant with an overall "4. Fair". The Director of the Division took note of the report. The Applicant, in describing his work, indicated that he performed translations on "any type of United Nations documents". The FRO disagreed, indicating that several categories of documents, particularly important or urgent ones, had never been given to the Applicant for translation. The FRO noted, in

paragraph 16, again as a "Special Comment", that "[the Applicant] has reached the ceiling in his professional growth. The present level of his performance is clearly inadequate". On 4 February 1993, the Applicant wrote to the Administrator, Personnel Service, contesting the performance ratings given to him by his supervisor. A Rebuttal Panel was convened on 23 April 1993 to examine the Applicant's case.

On 16 March 1993, the Applicant wrote to the Director-General, UNOG, requesting a review of the administrative decision not to renew his contract beyond 7 February 1993. He repeated that request to the Secretary-General on the next day.

On 17 May 1993, the Rebuttal Panel submitted its report to the Director of the Conference Services Division. It recommended that no change should be made in the Applicant's PER. However, the report pointed out certain procedural irregularities on the part of the Chief of the Russian Translation Section. These consisted of excerpts of certain memoranda by the latter relating specifically to the Applicant's performance and which were much more critical than the official PERs, although simultaneous therewith. These memoranda were apparently not shown or copied to the Applicant.

On 7 February 1993, the Applicant's fixed-term appointment expired. On 17 June 1993, the Applicant submitted a further statement in the light of the Rebuttal Panel's report. The same day, he lodged an appeal with the Geneva Joint Appeals Board (JAB) against the decision not to renew his appointment.

On 8 March 1994, the JAB adopted its report. Its conclusions and recommendations read, in part, as follows:

> "Conclusions and recommendations
>
> 38. The Panel concludes that the surrounding circumstances cannot be held as having created a legitimate expectancy of renewal of the Appellant's fixed-term appointment.

39. The Panel concludes that, despite certain procedural irregularities, there is no evidence to indicate the decision of non-renewal of the Appellant's fixed term appointment was motivated by prejudice, abuse of power or extraneous factors.

40. The Panel further concludes that the length of notice given to the Appellant of the decision of non-renewal of his fixed-term appointment was not in conflict with the Staff Rules and that it did not affect his rights to remedial action under the Staff Rules.

41. The Panel finally concludes that the Administration's delay in circulating to the staff members of the UNOG information concerning the amendment to staff rule 111.2 (c) deprived the Appellant of the right that was available to him as of 1 January 1993 pursuant to the amendment.

42. Taking into account the procedural irregularities referred to above, and considering that the delay in circulating the amendment to staff rule 111.2 (c) had deprived the Appellant of his right under the amended staff rule 111.2 (c), the Panel recommends that the Appellant be compensated in an amount equivalent to three months' net base salary at the rate in effect at the date of separation.

43. The Panel makes no further recommendation in support of this appeal."

On 9 May 1994, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB's report and informed him as follows:

"The Secretary-General has also noted but is not in agreement with the Board's conclusion that the timing of the circulation in Geneva of an amendment to the Staff Rules regarding the filing of a request for suspension of action had an adverse effect in your particular case. If you had filed a request for suspension of action, it would not have been effective. The granting of such a request in a case of non-extension of appointment requires the Secretary-General to take a positive action, namely to extend the appointment. The Secretary-General has determined that this type of action is not within the parameters of the request for suspension provision.

The Secretary-General, however, has noted the recommendation of the Board that procedural irregularities be taken into account in your case. He has decided to accept its recommendation that you be paid an amount equivalent to three months' net base salary at the rate in effect at the date of your separation from the Organization."

Whereas the Applicant's principal contentions are:

1. The Applicant had a legal expectation of renewal of his contract.

2. The decision not to renew the Applicant's contract was arbitrary and vitiated by prejudice and mistake.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right under his fixed-term appointment nor the legal expectancy of continued employment with the United Nations.

2. The decision not to renew the Applicant's fixed-term contract was not motivated by prejudice, abuse of power, arbitrariness, improper motive or other extraneous factors. Nor was the Applicant a victim of discrimination.

3. The delay in circulation of staff rule 111.2 (c) did not violate the Applicant's rights since that rule could not have been used to seek an extension of the Applicant's appointment.

The Tribunal, having deliberated from 23 October to 21 November 1996, now pronounces the following Judgement:

I. The Applicant appeals the decision of the Secretary-General not to renew the Applicant's fixed-term appointment. He seeks reinstatement or, alternatively, two years' net base salary. The Joint Appeals Board (JAB) recommended that, in view of the procedural irregularities in the Applicant's case, he be compensated

in an amount equal to three months' net base salary. The Secretary-General accepted this recommendation and paid the Applicant three months' net base salary as compensation. The Applicant appeals this decision to the Tribunal.

II. Because the Applicant complains that the decision not to renew his contract arose from factors unconnected to his job performance or conduct, it is necessary, first of all, to examine his performance, as reflected in his performance evaluation reports (PERs). There are four PERs, the last three of which were signed by the Chief, Russian Translation Section, against whom the Applicant makes allegations of arbitrariness, capriciousness and lack of truth. The first PER, of 17 November 1989, was entirely positive. The second PER was also positive, but the following two PERs, of 16 March 1992 and 22 December 1992, stated, respectively, that the Applicant's performance still left much to be desired and that his level of performance was clearly inadequate. While the Chief, Russian Translation Section, recommended extensions and a promotion at various stages in the Applicant's career, by November 1992, his view was that the Applicant's performance was totally inadequate. Therefore, he recommended that the Applicant's fixed-term contract be allowed to expire on 7 January 1993.

III. The Tribunal finds nothing in these PERs, taken in conjunction with the various recommendations of the Chief, Russian Translation Section, to suggest dishonesty or arbitrariness on the part of the Chief. On the contrary, because the various reports contain some positive references and favourable recommendations, it can scarcely be suggested that there was bias or partiality.

IV. The Applicant suggests that the Chief acted in a way which was adverse to him and failed to recommend his renewal because the

Chief wished to replace the Applicant with other staff members who would be totally beholden to him. The Rebuttal Panel was of the view that there was a remarkable turn-over of staff members in the Russian Translation Section. The Chief's response, in effect, is that he was attempting to streamline and increase the efficacy of the Russian Translation Section. There is no evidence to disprove such an assertion.

The Tribunal, therefore, finds that the recommendation against renewal of the Applicant's contract was properly based.

V. However, the matter does not end there. There were documents in existence relating to the Applicant's work that were not made available to him and of which he was not aware. The JAB, quite properly, was of the view that failure to reveal to the Applicant adverse memoranda relating to his performance constituted a breach of procedure and practice.

VI. The Applicant also contends that the late circulation of staff rule 111.2 (c) made it impossible for him to exercise a right to request the suspension of the decision not to renew his appointment. In contrast, the Respondent argues that the Applicant had a fixed-term appointment which expired automatically and that, in such circumstances, there is nothing to suspend pursuant to staff rule 111.2 (c).

The Tribunal believes that the Respondent's argument is somewhat pedantic. While the decision was one not to renew, the decision, in itself, was a positive action. The rule must surely be equally applicable both to such a decision and to a decision to terminate a staff member's employment. If it were otherwise, staff members whose contracts are not renewed would be at a disadvantage vis-à-vis those staff members whose contracts are terminated.

The fact that the staff rule, which came into effect on 1 January 1993, was not circulated until after the date of expiration of the Applicant's contract, placed him in a position where he could not avail himself of this rule. The Applicant also complains of inadequate notice of non-renewal of his contract.

VII. The Tribunal finds that the Applicant did not have a legitimate expectation of renewal of his appointment and that he was given reasonable consideration for renewal.

The Tribunal concludes, nonetheless, that the Applicant was placed at a disadvantage for several reasons.

Firstly, because not all relevant documents were made available to him, it could be argued that the Applicant was not sufficiently forewarned of deficiencies in his performance, and consequently, was not in a position to make efforts to improve his performance. However, such disadvantage is minimized because, as the JAB found, the Applicant received other warnings that should have put him on notice that his performance was not entirely satisfactory.

Secondly, the Applicant should not have been deprived of the opportunity to avail himself of the provisions of staff rule 111.2 (c).

Thirdly, on purely humanitarian grounds, after four years of service, the Applicant should have been given more substantial notice that there was not to be a renewal of his contract.

VIII. The Tribunal, therefore, orders that the Applicant be paid six months' net base salary at the rate in effect at the date of his separation, in addition to the three months' salary recommended by the JAB and accepted by the Secretary-General.

All other pleas are rejected.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

New York, 12 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary